

PEABODY COAL CO.
HOPI INDIAN TRIBE

IBLA 83-248

Decided April 29, 1983

Cross appeals from decision of the Acting Deputy Assistant Secretary, Indian Affairs (Operations), concerning determination of royalty value of coal produced from Navajo Tribe Coal Lease 14-20-0603-9910 and Hopi Tribe Coal Lease 14-20-0450-5743. IND-37-MIN.

Affirmed in part, reversed in part, and remanded for recalculation of royalty and late payment charges.

1. Accounts: Generally--Coal Leases and Permits: Royalties--Indian Lands: Leases and Permits: Minerals--Indian Lands: Mining Leases: Generally

Where coal leases for Indian lands state that the applicable royalty rate is to be based on gross realization, which is defined as the gross sales price at the mining site without any deduction of overhead sales costs or any other business expense, gross realization includes the amounts of the reclamation fee imposed by the Surface Mining Control and Reclamation Act, the tax imposed by the Black Lung Benefits Revenue Act of 1977, and the Arizona State mining tax, since the selling price is increased by these amounts and the seller is reimbursed for that amount by the buyer.

2. Accounts: Generally--Coal Leases and Permits: Royalties--Indian Lands: Leases and Permits: Minerals--Indian Lands: Mining Leases: Generally

It is proper to deduct the amount of fixed minimum royalty from the gross sales price of coal before calculating royalty due, where an amount representing the higher, percentage-based royalty is

added instead, since the latter entirely replaces the former.

3. Accounts: Generally--Coal Leases and Permits: Royalties--Indian Lands: Leases and Permits: Minerals--Indian Lands: Mining Leases: Generally

Where a coal purchase agreement provides that the purchase price of coal from the holder of an Indian lease shall be reduced by an amount reflecting the percentage of variation from an agreed minimum heat value of coal, and where the adjustment also reduces the purchase price by an amount reflecting the costs of transporting noncalorific material, this adjustment is properly allowed to reduce the gross realization and, as a result, the royalty due to Indian tribes which own the coal, because the low heat value of the coal is intrinsic to the material being "sold" by the Tribes, and because the value of the material sold is reduced by the amount spent by the ultimate purchaser of the coal to transport low heat value coal.

4. Accounts: Generally--Coal Leases and Permits: Royalties--Indian Lands: Leases and Permits: Minerals -- Indian Lands: Mining Leases: Generally

Owing to its fiduciary obligation to protect the interests of the Indian Tribes, the Department, through officials of the Geological Survey who supervise tribal mineral lease accounts, has the authority to impose late payment charges where equity requires them. Late payment charges are not penalties; rather, they represent the time value of money owed to the Tribes, but not paid. Accordingly, they may be imposed even where the lessee files a bona fide appeal of the underlying royalty determination. The lessee is protected from overpayment where the late payment charges are recalculated after final Departmental administrative review to correspond to the amount of royalty ultimately found to be due.

APPEARANCES: Jeffrey B. Smith, Esq., Phoenix, Arizona, for appellant Peabody Coal Company; Scott C. Pugsley, Esq., Salt Lake City, Utah, for appellant/respondent Hopi Indian Tribe; Claudeen Bates Arthur, Esq., Window Rock, Arizona, for respondent Navajo Indian Tribe; C. Eric Hager, Esq., and William R. Murray, Jr., Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The Peabody Coal Company (Peabody) is the holder of two coal leases: lease No. 14-20-0450-5743, with the Hopi Indian Tribe (the Hopi), and lease No. 14-20-0603-9910, with the Navajo Indian Tribe (the Navajo). These leases were initiated in June 1966 and embrace some 40,000 acres in Navajo County, Arizona, within the Navajo-Hopi joint Use Area. Peabody became the lessee of record in February 1968 following an assignment from Sentry Royalty Company, its subsidiary.

Peabody is producing coal from the leased lands, operating two surface mines, the Kayenta Mine on the eastern portion of the Joint Use Area, and the Black Mesa Mine on the western portion. ^{1/} Peabody sells the coal it produces in the Kayenta Mine to the Navajo Generating Plant (not affiliated with the Navajo Tribe) near Page, Arizona, and it sells the coal produced from the Black Mesa Mine to the Mohave Generating Plant near the Davis Dam in southern Nevada. In return for taking coal from the leased lands, Peabody pays the Navajo and the Hopi royalty, as provided in the coal leases. This dispute concerns the propriety of the manner in which Peabody computes the royalty due the Navajo and the Hopi on coal produced from the leased lands.

Under the terms of both leases, as amended in 1976, royalty is due at a rate of either \$0.25 per ton of coal produced, or a fixed percentage ^{2/} of monthly "gross realization," whichever is higher. The leases each define "gross realization" as "the gross sales price at the mining site without any deduction therefrom of overhead sales costs or any other business expenses." For many years, the gross sales price of coal has been high enough that more than \$0.25 per ton has been due, and Peabody has been computing the royalty due on the basis of gross realization from its sale of coal to the generating plants.

On November 28, 1978, the Department's Office of the Inspector General (OIG) issued an audit report stating that from June 1976 through December 1977, Peabody had used an incorrect formula in computing gross realization from production from the Black Mesa Mine resulting in an underpayment of almost \$250,000. OIG's audit report contained a revised formula to compute "gross realization," which Peabody was directed to use to compute the royalty due

^{1/} These mines are also producing coal from lands outside the Joint Use Area that are wholly owned by the Navajo and are leased by Peabody under lease No. 14-20-0603-8580. Peabody's royalty calculations have not been challenged as to this lease. However, this lease provides for royalties at a fixed rate per ton of coal produced, so that "gross realization" is not relevant.

^{2/} The percentage is 3.335 percent for the Hopi lease and 6.67 percent for the Navajo lease.

for 1978. Peabody did not comply. On January 2, 1979, the Area Mining Supervisor, Conservation Division, Geological Survey (GS), 3/ directed Peabody to pay the accrued royalties through 1977, and to recompute royalty due in 1978 as directed in the OIG audit report. Peabody appealed this decision to the Commissioner of Indian Affairs as provided in 30 CFR 290.6.

While this appeal was pending, on February 5, 1980, OIG issued a second audit report stating that Peabody was in arrears an additional sum of nearly \$270,000 for the period from January 1978 through August 1979 on production from both the Black Mesa and Kayenta mines and, as before, calling upon it to pay this amount and to revise its royalty formula. 4/ The Area Mining Supervisor so ordered on February 14, 1980, and also ordered Peabody to pay royalty on this basis from this date forward. Peabody appealed this order to the Commissioner as well, and it was consolidated with the pending appeal.

On August 16, 1982, the Acting Deputy Assistant Secretary, Indian Affairs (Operations), issued his decision ruling on both appeals, IND-37-MIN. He generally affirmed the Area Supervisor, holding that Peabody was required to pay additional royalty, but allowing it to reduce the amount of royalty due by applying a more liberal heat value adjustment than the Area Supervisor had allowed. The present appeals to this Board followed. Up to this time, Peabody has elected not to pay any alleged arrearages.

Peabody has adopted three different procedures that, according to MMS, the Navajo, and the Hopi, improperly reduce the amount of the "gross realization" and, as a result, the amount of the royalties paid to the Tribes. We shall consider each procedure in turn.

Non-inclusion in Gross Realization of Amounts Received by Peabody from the Generating Plants as Reimbursements for Fees and Taxes

[1] Peabody has not been including in "gross realization" the following costs of producing coal:

1. A 2.5 percent Arizona mining tax; 5/

3/ By orders dated Jan. 19 and Dec. 3, 1982, the Secretary of the Interior established the Minerals Management Service (MMS) and transferred to it all functions previously exercised by the Conservation Division, GS, including administration of collection of coal lease royalties. We shall use either name, as appropriate.

4/ This second OIG report amended the first report in one particular favorable to Peabody, discussed below.

5/ Peabody advises as follows concerning the applicable rate of tax for the Mohave and Navajo Generating Stations: "For sales to the Mohave Generating Station, which are sales outside the state, the combined tax is 2-1/2 percent. For sales to the Navajo Generating Station, which are sales for consumption within the state, the transaction is treated as a retail sale and is taxed at the rate of 4 percent" (Peabody Statement of Reasons at 34-35). For simplicity, we shall refer only to the 2-1/2 percent mining tax. However, MMS should use the actual applicable percentage to determine royalty.

2. A \$0.35 fee per ton of coal produced imposed by the Federal Government for contributing to the reclamation fund under section 402(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1232(a) (Supp. I 1977); and

3. A tax of \$0.25 per ton sold or 2 percent of selling price per ton, whichever is less, imposed by the Federal Government for contribution to the black lung disability compensation fund under section 2(a) of the Black Lung Benefits Revenue Act of 1977, 26 U.S.C. § 4121 (Supp. II 1978).

These costs are completely reimbursed to Peabody by its purchasers. Peabody itemizes these amounts separately on its invoices to these purchasers, along with "total selling price." Peabody has computed royalty as a percentage of the "total selling price" alone, thus effectively excluding these three items from "gross realization."

It is proper to include the amount of the reclamation fee imposed by SMCRA in the "gross value" of coal production for the purpose of calculating royalty, regardless of whether the seller is directly reimbursed the amount of the fee. Peabody Coal Co., 53 IBLA 261 (1981); Knife River Coal Mining Co., 43 IBLA 104, 86 I.D. 472 (1979) (Knife River II). It is also proper to include a state mining tax in the gross value basis, again, even if the seller is directly reimbursed. See Knife River Coal Mining Co., 29 IBLA 26 (1977).

The reasoning of both Knife River decisions, supra, applies equally to the question of whether to include the amount paid into the black lung disability compensation fund in the gross value basis. As we held in Knife River II, supra at 108, 86 I.D. at 474:

[V]alue for the purpose of royalty computation is generally equated with gross price. See 30 CFR 211.63(b). This is what the parties contemplated and the U.S. Geological Survey decision does not change that relationship. Whether the producer considers the reclamation fee in setting his selling price or not, the royalty is still based on value as determined by that selling price. If the producer recovers the amount of the fee from the purchaser, the purchaser has, in effect paid additional consideration for the coal, increasing the price to him, and thus the value for computing the royalty must also increase by that amount.

* * * * *

* * * If * * * [the lessee] passes along the reclamation fee to its customers, either through an increase in the selling price, or by a direct rebate of the reclamation fee, the United States is properly compensated for the increased value received. By attempting to diminish the price which is actually received by the amount of the reclamation fee, appellant is attempting to diminish what is clearly the gross value received by subtracting what is properly part of the cost of production. [Emphasis added.]

Here, Peabody passed along the black lung tax (and the reclamation fee and state mining tax) to its customers, thus increasing the gross sales price of

the coal and its value for royalty purposes. Accordingly, it was proper to include this tax in the amount from which the royalty was calculated.

There is no disagreement that Peabody's supply contracts with the generating plants were bona fide transactions. These contracts were last revised in 1976 and expressly provided in section 8.07 that the administrative costs of Federal regulations in force on April 1, 1975, were included in the price of the coal paid by the purchasers. The supply contracts also provide in the same section for an increase in the price to the purchaser to reflect cost changes attributable to any Federal or state regulations enacted on or after April 1, 1975, including, but not limited to, reclamation and health and safety fees. Thus, the terms of the agreements dictate that the increased costs of any new Federal regulation (including those requiring contributions to reclamation and black lung funds) and of any new state regulations (including those imposing the mining tax) be included in the price, just as were the costs of Federal mine safety regulations. The generating plants have consistently complied with these terms and reimbursed Peabody for the increased costs of complying with these regulations.

Peabody has not balked at paying royalty on a price which includes reimbursement for costs associated with Federal mine safety regulations. We see no basis to exclude the more recent regulatory costs, which are included as components in the price by the same contract provision.

Under 30 CFR 211.63(b), the gross value of the coal is its sale price in a bona fide transaction. The terms of the agreements establishing the sale price include in it the costs associated with Federal reclamation fee and black lung tax and the Arizona mining tax. Accordingly, under the regulations, it was proper to require Peabody to pay royalty on the total sales price, including these costs.

Peabody argues that the regulation in 30 CFR Part 211 do not apply to its operations here since they are on Indian lands. This argument is without merit. As provided in 25 CFR 1.3, although Title 25 of the Code of Federal Regulations contains the bulk of regulations of general application relating to Indian affairs, Title 30 of the Code of Federal Regulations contains regulations on mining operations, which, under certain circumstances, may be applicable to Indian resources. Article VIII of each lease at issue here provides as follows:

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 CFR 211 * * *. [Emphasis supplied.]

Thus, 30 CFR applies under the terms of the lease itself, thus creating the type of "circumstance" recognized in 25 CFR 1.3 as appropriate for the application of the regulations set out in Title 30.

In any event, the terms of the coal leases themselves dictate that Peabody must compute royalty as a percentage of "the gross sales price at the mining site without any deduction therefrom of overhead costs or any other business expenses." All three of the fees in question are directly associated

with the mining of coal. As such, they are properly considered as "overhead" or "business expenses" of operating a mine, and, under the terms of the lease, cannot be excluded from the gross sales price when computing royalty.

We hold that GS properly concluded that Peabody could not exclude these costs from the amount to which it applied the percentage royalty. The decision of the Acting Deputy Assistant Secretary is affirmed on this point.

Having determined that it was proper to include in gross realization amounts for adjustments for the Federal reclamation fee and black lung tax, and the Arizona State mining tax, we now address GS' prescribed method of computing each amount.

Reclamation fees. GS converted the sales price charged by Peabody from dollars per ton sold to dollars per ton mined. A ton of mined coal contains water, which is removed by drying prior to sale. The price per ton mined is the price per wet ton; the price per ton sold is the price per dry ton. GS added the Federal reclamation fee of \$0.35 per ton to the price per wet ton mined, and, in computing the gross realization, it multiplied the price per wet ton mined by the total number of wet tons actually mined, a weight that was substantially larger than the total number of "dry" tons sold, because it included both coal and water. The result was that the amount included in gross realization for the reclamation fee was substantially inflated.

Under 30 CFR 870.12, the reclamation fee must be determined by the weight of the coal at the time of the initial sale or transfer, i.e., by the dry weight of the coal. Thus, GS should have added the \$0.35 fee to the price per dry ton sold and multiplied this amount by the total number of dry tons actually sold in order to determine gross realization. Insofar as they provide otherwise, the decisions below are reversed.

Black lung tax. Under section 2(a) of the Black Lung Benefits Revenue Act of 1977, supra, a tax is imposed on coal sold at a rate of \$0.25 per ton sold from a surface mine, but not to exceed 2 percent of the sale price. Thus, the percentage rate will apply to coal sold at less than \$12.50 per ton, and a flat \$0.25 per ton tax is imposed on coal sold at more than \$12.50 per ton.

GS computed this adjustment by computing 2 percent of an amount equal to the gross sales price per mined ton less an amount representing Arizona mining tax, as follows: Black Lung Tax = .02 (Total Selling Price/mined ton -- .025 Total Selling Price/mined ton). As we held concerning the Federal reclamation fee, it was improper to use price per mined ton to compute the black lung tax, since the tax is properly computed on a percentage of ton sold. Insofar as they held otherwise, the decisions below are reversed.

Arizona mining tax. GS' method of adding the mining tax to the gross realization was also defective. It directed Peabody to add an amount into the gross realization equal to 2.5 percent of the total gross realization. Since the total gross realization includes the amount added for the mining

tax, the result was that Peabody added an amount into the gross realization equal to 2.564 percent, rather than the 2.5 percent actually required to accurately reflect the Arizona mining tax. ^{6/} GS should have directed Peabody to include an amount in gross realization equal to 2.5 percent of the gross realization minus 2.5 percent of the gross realization as follows: Amount includable in gross value to represent Arizona mining tax = .025 [Gross realization - .025 (Gross realization)]. Insofar as they provide otherwise, the decisions below are reversed.

Deduction of Fixed Minimum Royalty from Gross Realization

[2] Where the computation of royalty as a percentage of gross sales price yields more than the fixed minimum royalty of \$0.25 per ton, Peabody deducts the amount of the latter from the base price. OIG objected to this procedure in its first audit report in November 1978, but subsequently conceded that it was proper in its second audit report in February 1980. Both the Area Supervisor and the Acting Deputy Assistant Secretary also held that this procedure was proper.

The supply agreements between Peabody and the generating plants provide for a specified base price per ton of coal purchased. These supply agreements also provide in section 8.08 that the base price could be revised to reflect "changes" in royalties payable by Peabody to the Tribes.

Peabody does not dispute that the amount paid by the purchasers to reimburse Peabody for its royalty obligations should be included in the gross sales price for the purpose of computing the amount of the royalty due. The only question is whether, in determining the gross sales price, it is proper to deduct the \$0.25 per ton minimum royalty charge from the gross sales price before adding the higher percentage-based royalty charge.

Peabody has taken the position that the initial base price agreed to in 1976 included the \$0.25 per ton minimum royalty fee. Therefore, it argues, this \$0.25 per ton amount should first be subtracted from the base price before the percentage-based royalty is added, since the latter entirely replaces the former. The Acting Deputy Assistant Secretary agreed, holding that the use of the word "changes" in section 8.08 implied that the parties had agreed in 1976 that an amount attributable to Peabody's royalty obligation was included in the base price. We affirm this finding. We agree that the \$0.25 per ton minimum royalty may be deducted from the base price prior to adding in the higher actual percentage-based royalty. The decision of the Acting Deputy Assistant Secretary is affirmed on this point.

^{6/} In contrast, for Indian royalties, it was proper to include in gross realization an amount equal to 6.67 percent of the total gross realization, even though the total gross realization includes the amount added for Indian royalties. This is because the sales agreement provides that the sales price shall include the amount paid for royalty (section 8.08). In turn, the Indian lease defines "gross realization" as the sales price and dictates that royalty shall be 6.67 percent of the gross realization.

Reduction of Gross Realization by BTU Adjustment Reflecting Transportation Costs

[3] Peabody computes the royalty due to the Hopi and Navajo by applying the appropriate royalty percentage to a figure that it calls "total selling price" (TSP). Peabody's TSP is the sum of three discrete elements: the selling price per dry ton, the royalty due to the Tribes, and a price adjustment based on the heat value of the coal in British Thermal Units (BTU's) per pound. The last factor reflects provisions in Peabody's coal sale agreements specifying a minimum heat value of 12,235 BTU's per dry pound (section 5.02) and adjusting the price to reflect the actual heat value of coal delivered to the generating plants (section 10.01).

Using coal sold to the Mohave Generating Plant as an example, the formula specified in the sale agreement for computing the BTU price adjustment is as follows:

Adjustment = [Delivered Price Per Ton X Average Number of BTU's per dry pound of coal delivered during month / 12,325] - Delivered Price per Ton

"Delivered price per ton" is defined as the sum of two elements: (1) the "mine price" of the coal, its price delivered only so far as to the coal slurry preparation plant, which is at the Black Mesa minesite; plus, (2) the price for transporting the coal as slurry through the Black Mesa Pipeline to the Mohave Generating Station. By substituting these two elements for "delivered price" in the above formula, it is evident that the BTU adjustment does include a percentage of the cost of transporting the coal to the generating plant:

Adjustment = [(Mine Price + Transportation Price) X Average Number of BTU's per dry pound of coal delivered during month / 12,325] - (Mine Price + Transportation Price)

OIG and the Area Supervisor disallowed this adjustment insofar as it included transportation costs. The Acting Deputy Assistant Secretary reversed, holding that use of the adjustment reflected the fact that coal with low heat value is worth less to the purchaser because it incurs the same transportation costs as higher heat value coal, even though it does not produce as much electricity. He concluded that, since the parties had agreed on this method of recognizing the reduced value of coal with low heat value in a bona fide purchase and sale transaction, under 30 CFR 211.63(b), the method should also be used for computing value for royalty purposes. We agree.

The BTU adjustment as set out in section 10.01 of the sale agreement is a reasonable method of establishing parity of values for different qualities of coal. It is fair to adjust the royalty paid to the Tribes for coal with

low heat values, since these low values are intrinsic to the material being "sold" by the Tribes. ^{7/}

It is also reasonable to adjust the value for royalty purposes by an amount reflecting transportation costs that correspond to the percentage of actual BTU value compared to ideal BTU value. Money spent by the generating plants to transport low heat value coal to their facilities is wasted to the extent that the coal does not produce as many BTU's. It is only fair to recognize that the gross value of the coal to the generating plant is reduced by the amount lost on transporting noncalorific material, and to reduce royalty accordingly, since this reduction is directly attributable to the nature of the material "sold."

Computation of Gross Realization

In summary, the "gross realization", the total to which the prescribed royalty percentage must be applied, is as follows:

1. "Initial" or "base mine price" per dry ton as specified in section 6.01 of the service agreement;

2. Less the \$0.25 per ton minimum royalty;

3. Plus or minus adjustments for:

A. Labor costs (including union welfare fund costs);

B. Costs of materials and supplies;

C. Administrative costs;

D. Inflation or deflation;

E. Ad valorem taxes;

F. Costs of law changes (including Arizona mining tax, and Federal Black Lung and Reclamation fees);

G. Amount paid for Indian royalties; and

H. Changes in capital investments;

4. Plus or minus BTU adjustment per dry ton, including transportation costs.

^{7/} The heat value of coal can exceed 14,000 BTU's per pound. Presumably, the BTU adjustment as agreed by the parties would also increase the royalty paid to the Tribes for any coal produced having a heat value in excess of 12,325 BTU per pound.

Most of the above 8/ adjustments are calculated on the basis of elements independent of the computation of the gross realization as prescribed in the sales agreement. However, adjustments for Arizona mining tax, Federal black lung and reclamation fees, Indian royalties, and BTU content all depend on the amount of the gross realization. It is useful to include all of the independent adjustments in one single adjustment and apply it to the base price to reach a subtotal, in order to simplify illustration of the computation of gross realization. Peabody has done so, calling the subtotal the "adjusted base mine price (ABMP)," 9/ or element "A." Adopting this convention for computing gross realization, the formula is as follows:

$$\text{Gross Realization (GR)} = \text{Adjusted Base Mine Price per Dry Ton (ABMP)} + \text{Arizona Sales Tax } \underline{10/} + \text{Federal Black Lung Fee } \underline{11/} + \text{Indian Royalties} + \text{BTU Adjustment. } \underline{12/}$$

Substituting the subformulas for computing these adjustments, as described above and in the footnotes, will yield the gross realization.

8/ The following adjustments to base price are calculated independently of the computation of gross realization: minimum royalty, labor and related costs, union welfare, materials and supplies, administrative costs, law changes (other than Arizona sales tax and Federal black lung tax), inflation/deflation, ad valorem taxes, and capital investment.

9/ For example, using figures cited by Peabody as applicable to December 1978 as modified to reflect the inclusion of the Federal Reclamation fee, the "adjusted base mine price" per dry ton is as follows:

| | |
|---|----------|
| Base price | \$3.798 |
| Less Royalty in Base Price | (.250) |
| Base Price Exclusive of Royalty | \$3.548 |
| Labor and Unrelated Costs | 1.538 |
| U.M.W.A. Welfare | .071 |
| Materials and Supplies | 1.253 |
| Administrative Costs | .501 |
| Law Changes (including \$0.35 Federal Reclamation fee, excluding black lung tax and Arizona mining tax) | 1.491 |
| Inflation-Deflation | .669 |
| Capital Investment | .719 |
| Ad Valorem Taxes | .288 |
| Total | \$10.078 |

10/ The Arizona mining tax adjustment = .025 (Gross Realization - .025 Gross Realization), or .04 (Gross Realization - .04 Gross Realization) (See note 5 *supra*).

11/ The Federal black lung tax adjustment = .02 (Gross Realization - .025 Gross Realization).

12/ The BTU adjustment [(Gross Realization + Monthly Trans. Costs / Monthly Tons Delivered) X Avg. Actual BTU Content / 12,235 BTU/lb.] - Gross Realization + Monthly Trans. Costs / Monthly Tons Delivered

Late Payment Charges on Royalty Amounts Not Paid as Directed by the Area Supervisor and OIG

[4] On January 29, 1981, the Deputy Conservation Manager, Conservation Division, GS, advised Peabody that, since it had not paid increased royalties as directed by OIG, it would be assessed interest on all unpaid royalties. GS specified that interest would be computed from January 2, 1979, on \$245,454.63, the alleged arrearage from June 1976 through December 1977, and from February 14, 1980, for all subsequent arrearages. These were the dates that the Area Supervisor had sent his letters notifying Peabody of OIG's conclusions that it was underpaying royalty. Since GS also requested in its February 14, 1980, letter that Peabody compute all future royalty in accord with the method specified by OIG, it advised Peabody that all arrearages accruing after this date would be subject to interest from their dates of accrual. Peabody protested to GS, asserting that it was inappropriate to assess late payment charges, since it was in the process of appealing the decision that raised the royalty and led to the alleged arrearages.

The Acting Deputy Assistant Secretary, Indian Affairs (Operations) affirmed the determination that late payment charges should be assessed, holding that the charges should be computed as specified in 30 CFR 211.67 (1981). He ruled that these charges were not intended to penalize Peabody for having brought its appeal of the merits of the reassessment orders. Rather, he held, the charges were meant to compensate the Tribes for the "time value" of whatever money was actually owed to them but not paid by Peabody. We agree.

Area Supervisors have the authority, independent of any specific grant of regulatory authority, to make a unilateral determination of interest owed, where equity requires that it be imposed. See Atlantic Richfield Co., 21 IBLA 98, 111, 82 I.D., 316, 322 (1975); see also Full Circle, Inc., 35 IBLA 325, 341, 85 I.D. 207, 215 (1978). The imposition of late payment charges is appropriate to compensate for the loss of use of funds due but not paid, even where the lessee pursues a bona fide appeal of the underlying determination instead of paying the demanded amount. Atlantic Richfield Co., *supra* at 108, 85 I.D. at 321. The lessee is protected from overpayment where the late payment charges are recalculated after final Departmental action to correspond to the amount ultimately found to be due. With the high rate of inflation and the concomitant rise in prevailing interest rates during part of the period in question, equity requires compensation for the time value of money owed by Peabody to the Tribes, but not paid.

The Department is obligated, as the fiduciary of the Indian Tribes, to oversee operations on Indian leases and to insure that their interests are protected. 25 U.S.C. § 399 (1976). Its conduct is judged "by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). It would be a breach of this fiduciary duty not to protect the Tribes' interests by imposing late payment charges, particularly since we have recognized the authority to charge prejudgment interest to protect the Government's own interests.

We have held that the Area Supervisor had ample authority to impose late payment charges, even prior to the effective date of 30 CFR 211.67, which specifically provides how to compute the charges. It is appropriate to adopt the methodology specified in 30 CFR 211.67 here.

On remand, MMS should recompute the royalty due each month from June 1976 forward, making the changes specified herein, and calculate the amount of any underpayment for each month. Any underpayments for the period from June 1976 through December 1977 are subject to late payment charges as provided in 30 CFR 211.67, using January 2, 1979, as the due date. Any underpayments for the period from January 1978 through February 1980 are subject to late payment charges using February 14, 1980, as the due date. Any subsequent monthly underpayment is subject to late payment charges using the customary end-of-the-month due date. Under 30 CFR 211.67, any payments made by Peabody during this entire period should be applied to the balance prevailing at the time of payment. Thus, it will be necessary to completely recompute Peabody's royalty account back through June 1976.

Given our ruling on the late payment charges issue, it is unnecessary to take action on the request to put the Acting Deputy Assistant Secretary's decision into effect immediately. We note, however, that our ruling satisfies the essence of that request.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for recalculation of royalty and late payment charges, as set out above.

Douglas E. Henriques

Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris,
Administrative Judge.

